TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

JOHN SCHLIB, et al.,

Plaintiffs-Appellants,

vs.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County, et al.,

Defendants-Appellees.

No. 70-90

Washington, D.C.
October 12, 1971

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Washington, D. C.,
Tuesday, October 12, 1971

The above-entitled matter came on for argument at 2:00 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

JOHN J. O'TOOLE, ESQ., 111 West Washington Street, Chicago, Illinois 60602, for the Plaintiffs-Appellants

JAMES A. ROONEY, ESQ., Assistant State's Attorney, Cook County, Illinois, for the Defendants-Appellees

CHIEF JUSTICE BURGER: Mr. O'Toole, you may now proceed.

MR. O'TOOLE: Mr. Chief Justice, may it please the court, I move that James A. Rooney be permitted to argue pro hoc vici on behalf of the appeal in this case. He is a member in good standing of the Bar of Illinois, but has not been a member for more than three years.

QUESTION: Your motion is granted for the purposes of this case.

You may proceed.

MR. O'TOOLE: In 1963, the 75th General Assembly of the State of Illinois revamped our entire bail procedure and they did this for a two-fold reason. In the main, the most important one, was to assure that all persons regardless of their financial status would not be unnecessarily detained awaiting trial. As ansulary blessing of the system, we have practically eliminated the bondman system in the State of Illinois. Basically, what this legislation did was to enable a person accused of a crime to gain his pre-trial freedom in one of three manners. Under 1102, he could make an application for release on his own recognizance. Under 1108, he could post the full amount of the bond, I mean the bail set by the court in either cash, stocks, bonds or real estate in double the value, or he

could deposit 10% of the full amount of bail under 1107. In all, this was very good and it has been very effective. But in doing so, they put in one anachronism. That is, they impose a cost on the individuals who are released under 1107. Those that make a deposit of 10% of the full amount of bail. In this case, John Schilb and all those other similarly situate sought and received their release under 1107 and they were all charged a 10% bailiff cost upon the release or conviction. Now, we contend that this imposition of a cost on this one segment is unconstitutional for all of the people involved here seek one end, and that is to be released so they could prepare for trial and not be subject to pre-trial incarceration. Yet they impose the burden of supporting the entire system on one segment of that class.

QUESTION: If they imposed the 1% on those who deposit 100%, you would not be here?

MR. O'TOOLE: Oh no, your Honor. I think that as the argument develops, Mr. Justice Blackmun, you will see that if there was an across the board imposition of a cost, I would still alledge that it would be not proper in that it could never be imposed upon indigents, true indigents, nor could it ever be imposed upon a man who was found innocent so just an across the board statute, I do not think, would solve our --

QUESTION: You mean even if it were simply that everyone released under either of the three provisions would pay $10, still that would be wrong?

MR. O'TOOLE: I think it would be wrong when it came to a true indigent, or a person that was innocent.

QUESTION: Well, a true indigent, it might be they could not pay it, that would be one problem, but you would also say it was unconstitutional if a charge is made to a chap ultimately found innocent of the $10, is that right?

MR. O'TOOLE: Right. That is part of our contention before this court. It is not only this class aspect. We say that one segment is segregated out and burdened. But in addition to that, we also contend that these people who put up the 10% simply cannot afford the full amount of bail and are penalized in their request for justice in contrary to the long line of cases since Griffin versus Illinois.

QUESTION: Is that necessarily true? A man might be in business and want to keep his cash position very liquid so instead of buying a bond, he put up the 10% even though he had $100,000 in the bank?

MR. O'TOOLE: Oh yes, your Honor. I agree with you fully that that statement was not meant to be a universal.

I think the statistics will bear out, which we have cited some in our brief, that as the amount of bail goes up the ability to make the full bond decreases sharply, and whereas some people might choose to only put up the 10%, the fact is that he has a choice but what about that large segment of our population? Actually, this is moderately poor, the working man, who just does not have a sufficient asset to make that choice. He has no choice. He has to go in, make the deposit and then he is subjected to the burden of supporting the whole system. It is not his choice.

QUESTION: But everybody who walks into the lower amount pays the same amount?

MR. O'TOOLE: Yes, your Honor. That element. But then if it is unconstitutional to even impose it on one person, I think the whole statute is --

QUESTION: I gather your class here is not limited to indigents.

MR. O'TOOLE: No. The true indigent is helped in one way by 110 and is harmed in one way by 1107 of which is the cost provision. If I were a true indigent, I would have a far better chance of borrowing the money if I could sign the back of that bond receipt and the one who lent it to me was going to get the full amount back. As it is now, he only gets 90% of it back.

QUESTION: But if he is a true indigent, he would not have the 10% to post, would he?

MR. O'TOOLE: I agree with you, your Honor. We are talking about the relatively, the --

QUESTION: We are speaking about people here who, if I understand it correctly, who have posted the 10%?

MR. O'TOOLE: That is right, your Honor.

QUESTION: And whose complaint is that when the purpose of the bail has been served, they get back only 90% of what they deposited, is that right?

MR. O'TOOLE: Yes.

QUESTION. So, we are really talking about indigents as indigents.

MR. O'TOOLE: Actually not indigents in the true sense of the word.

QUESTION: What you are saying is a state may not say to anybody, we will relieve you from the obligation to post 100% of bail which is our old system. We will give you the chance of getting out on bail by depositing 10% but, in that case, it will cost you something. It will cost you 1%.

MR. O'TOOLE: I do not think they can do it if they do not do it in an equal manner.

QUESTION: They say that to everybody.

MR. O'TOOLE: Excuse me, your Honor.

QUESTION: They say that to everybody.

MR. O'TOOLE: I do not think they have the power. I think the way that it is set up here that it just is not constitutionally permissible.

QUESTION: But if I were a rich man or if I had some money and the State gave me this choice, it would still be invalid as to me.

MR. O'TOOLE: On the 10%? I do not think it could be roximately segregated out to a question of proof in each case if an individual actually had the option but the question remains that as long as all people do not have the choice, that those that -- this is their only means of getting out on bail, they should not be charged with the burden.

QUESTION: As I get it, those who were released on their own recognizance are charged no fee to support the bail system or administration, right?

MR. O'TOOLE: Right.

QUESTION: Those who post 100% are charged no fee to --

MR. O'TOOLE: Are charged no fee.

QUESTION: The only ones who pay are those who post 10%.

MR. O'TOOLE: That is right.

QUESTION: And they are charged 10% of the 10%?

MR. O'TOOLE: 10% of the 10% or a net of 1%.

QUESTION: Going back to a hypothetical someone posed you before, I would like to get your answer again. Suppose the statute provided for a $25 fee for everyone for administrative override whether released on his own recognizance, whether released on a bail bond or whether released on 10% or 100%. What about that?

MR. O'TOOLE: I would answer the question the same manner, Mr. Chief Justice, and that would be that I think that it would be valid as to all except the true indigent and except to those that are found innocent.

QUESTION: Well, by definition, the indigent for all practical purposes has a waiver. I just assume that you cannot get blood out of the turnip as it were. Then you would say it is invalid as to the person ultimately found innocent?

MR. O'TOOLE: Right.

QUESTION: On what theory is that?

MR. O'TOOLE: The theory of that is --

QUESTION: Constitutional theory?

MR. O'TOOLE: Constitutional theory in that this court handed a decision in 1966 in Giaccio versus Pennsylvania, in which a jury in Pennsylvania was permitted after finding a person innocent to impose court costs and

that the court in the majority opinion held that the statute was vague but the concurring opinion of Mr. Justice Stewart stated in his opinion. it was a violation of due process, rudimentary due process, and I think that that is the law of the land and that should be the law in regard to this case. In no manner can anybody impose a cost attendant to a criminal proceeding on an individual found innocent. If there is any question as to whether that is an integral part of the proceeding, it is probably the most important aspect because it affects a man's family, it affects the outcome of the trial, it affects the severity of the sentence, and unduly burdens a man. He looses his job. And that --

QUESTION: Mr. O'Toole, that was somewhat different, at least in chronology in the Giaccio case because there there was a trial and the jury found the defendant innocent and then, and only then, was the defendant required to pay something after he had been found innocent. But surely there is a cost, there are many costs imposed upon people under charges of criminal offenses if not monetary costs. There are the costs of, well the possibility of incarceration if he cannot make bail and the various other social costs and personal and physiological costs that go along with just being the target of a criminal charge even if the person is eventually found not

guilty. There are all sorts of costs and neither the constitution nor any judges interpreting it or applying it can really very well avoid those costs.

MR. O'TOOLE: I agree with you, Mr. Justice Stewart, that there are other costs that are created by our Society.

QUESTION: Just by the leveling of a criminal charge?

MR. O'TOOLE: Right. But this is not created by our Society. This is created by our legislature.

QUESTION: It is part of Society.

MR. O'TOOLE: Part of Society in Illinois at any rate.

MR. O'TOOLE: A cost attendant to that proceeding. It would be interesting to note, too, in relation to that cost, that prior to the enactment of their new act when we had the bondmen, the clerk performed the same service and handled the same paper and never charged anybody anything.

QUESTION: The clerk did not but the --

MR. O'TOOLE: Now, the legislature --

QUESTION: But the expense of the point of view of the defendant, as I gather, was much, much higher until you got this so-called reform legislation?

MR. O'TOOLE: That is right, your Honor. But, basically, I believe the difference here is that we

cannot remedy the aspect of the social evil but we can remedy this cost.

QUESTION: Mr. O'Toole, as you prevail here, do you anticipate the old bondman system will be revised?

MR. O'TOOLE: Oh no, your Honor. Mr. Justice Blackmun, that is the furthest thing -- we want to make that eminently clear. We believe this to be very good legislation. We feel this aspect of it is wrong. Definitely not, there would not be any reincarnation of the bondsman.

QUESTION: Well, obviously, there is an expense to administrating this program.

MR. O'TOOLE: Yes, your Honor.

QUESTION: And the State somehow has to pay those expenses. Now, if you prevail, where are they going to get the money to pay the costs of administering it?

MR. O'TOOLE: The same place they got it before, Mr. Justice Brennan.

QUESTION: Out of what?

MR. O'TOOLE: Back under the old system, on the bond for features, they realized X dollars. Today, under our statute, our sheriff, our States Attorney, is required to collect bond forfeitures and to go after people that do jump bond and that if a person has the full amount of bail up or has 10% up right at that point, you have costs coming

in or costs reimbursement. In addition to that, the spread of record in the Vera Foundation, District of Columbia bail study and various other findings that the local and state and federal governments are saving millions and millions of dollars a year due to the fact that when we have enlightened legislation such as this, that the jail population slips significantly, and that there are fewer people incarcerated waiting trial.

QUESTION: Of course, they could put $5 say, they could impose 5% a head on everyone who is admitted to bail, wether under personal recognizance or anything else, but you would attack that yourself.

MR. O'TOOLE: I would only say we would have trouble in the area of the true indigent and I still feel that it could cost attendant --

QUESTION: You could not have anymore trouble than you would with this present system where a true indigent is required to put up 10% of the bail when he cannot make it. He stays in jail?

MR. O'TOOLE: That is right, your Honor. The true indigent has no problem in that area.

QUESTION: Mr. O'Toole, what do you think was the supposed policy behind the distinction between the 10% people and the 100% people?

MR. O'TOOLE: Well, I believe this was the idea

behind it, is that at the time or prior to the enactment of legislation under the bondman system an individual could give the bondman 10%. The bondman, in most cases, would retain the entire 10%.

QUESTION: You do not think it is feeling that the 10% people would be more likely to jump bond than those who put down 100%?

MR. O'TOOLE: I do not believe so, your Honor. I believe, basically, it was a question that they felt if these people were paying a charge to the bondman they could pay a charge to the clerk, a charge which was never imposed on them before but there was one basic difference in that too. Our clerk does assume liability for any bail jumping as the bondman did. There the cost was justified by a possible liability.

QUESTION: Incidentally, has the election, that of the suspect whether to deposit 10% or 100% or may the judge say, in your case, you will have to deposit 100%? I would not accept 10%.

MR. O'TOOLE: Mr. Justice Brennan, in the State of Illinois, it is 10% flat. No discretion in the court at all.

QUESTION: I see. In other words, a suspect may make the election whether to deposit 10% or 100%. If he is denied release on his own recognizance?

MR. O'TOOLE: Right. If he has the necessary fund.

QUESTION: And if it is a bailable offense?

MR. O'TOOLE: Yes, that is right. There are a couple of offenses in Illinois which are not bailable.

QUESTION: I go back to the proposition I suggested before and let me make a variation of it. Suppose a man had $1 million in the bank and it fixed $100,000 as bail. If he has that money out earning interest, is he likely to put up 100% or is he likely to put up 10%?

MR. O'TOOLE: I do not know what that individual would do. Perhaps, he would elect to put up the 10%.

QUESTION: Simple automatic arithmatic and common sense; he would put up 10%. So it is not a poor man; rich man argument really at all, is it?

MR. O'TOOLE: I think when you get into the poor man-rich man area, Mr. Chief Justice, this court in a bail application, Mr. Justice Douglas said that having -- that poverty in the area of bail is merely whether you have enough money to pledge for your freedom. This was recognized by our former Chief Justice in a speech before the National Bail Conference also. When it comes to bail, the question of poverty is a relative concept. If my bond is $1 thousand and I have $1 hundred, I am a poor man because I am going to be incarcerated

waiting trial. That is the concept. Also, we have to take into effect, I could give you an example saying the State of Illinois, if an individual owned a large building worth $1 million and he had a mortgage of $1 hundred thousand on it, he could not pledge that on a real estate bond because our statute requires unencumbered property. He would be relatively poor as far as that were concerned and he would have no choice as to whether he was going to deposit full or 10%. We feel that it is very clear from Renaldi that one segment is definitely discriminated against. We feel the relative poor are discriminated against. We feel this is a cost attendant to a criminal proceeding which should not be cognizant.

CHIEF JUSTICE BURGER: Mr. Rooney, you may proceed whenever you are ready.

MR. ROONEY: Chief Justice, may it please the court: I think that the best way to understand why the Illinois 10% deposit provisions are constitutional is to take a look at what we had in Illinois before they were passed. Prior to 1963, when the whole bail procedure in Illinois was overhauled, we had two ways of getting out of jail once the bail had been set. First of all, you had a release on recognizance which was not utilized. That was prrhaps cured, perhaps not cured. Release on recognizance doubled in Illinois since the bail reform statute went through.

QUESTION: The number released on recognizance?

MR. ROONEY: It doubled. It is still not an extremely large percent but we still have the release on recognizance. The only other way you could get out prior to 1963 was whether to have yourself or somebody else for you pledge the full amount of the bond. Now, because you had to pledge the full amount of the bond, there were defacto three categories of people. There were the rich who could put up the full amount of the bond. There were those who could not put up the full amount of the bond but could go to the bondsman and pay his fee and get out that way. And then, there were really the truly indigents who

just did not have the money even to go to the bondman. They had to stay in jail pending the trial of their case. Now, I think there is a difference of opinion as to the purposes of 1107. The 10% bail deposit provisions. They were, first of all, designed to get rid of the bail bondman in Illinois.

QUESTION: What form does that 10% usually take?

MR. ROONEY: The 10% usually cash.

QUESTION: What other forms may it take?

MR. ROONEY: The statute says that it is money. That is all.

QUESTION: So, it has to be cash?

MR. ROONEY: It has to be cash. The other purpose of the Bail Reform Act, the 1107 was to reduce the financial imposition on those who had to go to the bail bondman. The reason we wanted to get rid of the bail bondman is fairly obvious. They have been the villain through all the legal journals over the last 20 years. There were all sorts of abuses including some scandals that unfornunately involved judges and assistant states attorneys in Cook County and throughout the State of Illinois, but that does not mean that a bail boudman should still be around just because we have judges and assistant states attorneys involved. The big problem was that by statute in Illinois, a bail bondman could charge 10%. Now, that was supposed to be the

maximum limit the bail bondman could charge. Unfortunately, in things like this, that become the minimum. It finally got to the place where the bail bondman, not the judge, held the keys to the jail, in many cases, because if you are unable to post the full amount of the bond and you want to see the bail bondman, he will take a look at you and decide whether or not you are a good risk. If you are not a good risk, the price went up. So, 10% was the beginning of the bargaining. There are other scandals that involved the bail bondman having judgments vacated and not returning the pledges to the defendants and, of course, the way they got the defendants back to the court room if the bond had been jumped was notorious. So, what the Illinois legislature wanted to do was first of all get rid of the bail bondman. Second, of all, make it a little bit less expensive for those who are not exercising a constitutional right but exercising really a statutory right to get out. When you went to the bail bondman, you put down the amount of your bail, excuse me, the 10% with many, the statutory amounts and the bail bondman signed a bond. He did not have to put down any money. He had money down in Springfield. That is the way it worked. But when you put down that 10%, that is the last you saw of it no matter whether you were innocent, or guilty, you forfeited 10% of the amount of your bond. Now, I think a question was asked where do we get the 10%

and the 1%.

QUESTION: While you are explaining this, tell us what you think is the purpose of the 1%?

MR. ROONEY: The purpose of the 1% is to cover basically the expenses of the clerk in writing the bonds, keeping records on the bonds, returning forfeited bond. It is a big operation in Cook County.

QUESTION: Why isn't it charged to the man who puts 100% down?

MR. ROONEY: It is not charged to the man who puts 100% down because we feel he is exercising a constitutional right. We feel the constitutional right is the right to a reasonable amount of bond. Now, the man who gets the hundred percent bond, he is exercising a constitutional right to what a reasonable amount would be. The man who is exercising the 10% right is exercising a statutory right which we feel we are not letting an unreasonable amount of bond, we are letting him out on 10% of a reasonable amount.

QUESTION: Isn't it harder to justify those out on their own recognizance?

MR. ROONEY: It makes it harder to justify those.

QUESTION: Why don't we charge it to them? They are not necessarily indigents. As a matter of fact, it is more likely they are not.

MR. ROONEY: We think they are a little differently

situated than those --

QUESTION: Not expense wise to the system?

MR. ROONEY: Not expense wise to the system but before you are released on recognizance, the judge makes a defacto rather extensive look into your background and we think these types of defendants, since it is more likely that they will show up and it is all relative, it is sort of discretionary with the judge, release on recognizance, since they are more likely to show up, we think that they are sufficiently differently situated as not to charge them --

QUESTION: Did the legislation ever consider a flat fee basis instead of --

MR. ROONEY: I do not believe so.

QUESTION: Certainly, the cost to the State is across the board, isn't it?

MR. ROONEY: The cost to the State is across the board and in the stipulation of facts, when we process a bond where the stocks or securities or mortgage on a -- unmortgaged real estate are put down, there is perhaps a slightly greater expense to the State than when just cash is put down.

QUESTION: Our States have gone to systems like this, have they not? The 10% deposit and so forth. Do you know whether they limit the charge to --

MR. ROONEY: Illinois is unique on charging 1% fee.

QUESTION: Thye charge a flat rate or what? What do the others do? Charge nothing or a flat rate?

MR. ROONEY: A good example is the Federal statutes. In the Federal statute, it is up to the discretion of the judge whether he lets you out at 100% or 10%. Now, there are all sorts of other conditions he put on your bond. In Illinois, the legislation limited the discretion of the judges to either releasing a man on his recognizance or setting a dollar amount of bail. The legialature has not vetoed the judge with that type of discretion to perhaps let a man out another 10% or perhaps not. Once he sets the amount, it is automatic.

QUESTION: Mr. Rooney, to go back to the 1%, isn't $1 hundred thousand bond and a $1 thousand bond on the same kind of paper, take the same amount of time? Why didn't he just say a flat rate of $10 for each bond? Is anything in history on that at all?

MR. ROONEY: Yes, there is something in the history. The committee that recommended the legislature that this Bail Reform Act be adopted found that, first of all, there was a 10% charge the bail bondman charged and the general bond forfeiture rate brought into the State alone, out of all the bond forfeited and almost all were written by bail bondmen at that time, we got a run of 1% of the amount of money. That is where they chose the

1%.

QUESTION: At any given time, if you know, what is the balance or the average balance in all of the accounts maintained for this 10%?

MR. ROONEY: The average balance?

QUESTION: Yes.

MR. ROONEY: I can tell you how much the State ends up making each year, which is -- in Cook County, excuse me. In Cook County, we end up making about $1,250,000 a year.

QUESTION: In interest?

MR. ROONEY: In 1%.

QUESTION: I mean in interest. This money, whether it is 100% or 10%, is put in the bank, I assume, isn't it?

MR. ROONEY: I assume so.

QUESTION: And I assume also it is put in a bank that pays interest?

MR. ROONEY: Our public officials would be remiss in their duty if they did not put it in that type of act. I do not want the -- I guess the interest would be 1 thousand -- 1,250,000 times whatever the prevailing back would be.

QUESTION: That is just one percent, that 1 million. We are talking about 10%. The 10% deposit. The

total of all 10% deposits is how much?

MR. ROONEY: That would be $12 million then. $12,500,000 over a year.

QUESTION: So you have that much money --

MR. ROONEY: I do not know what the cash flow is and how much we do have in the accounts at any given moment.

QUESTION: Let's assume 4%. That is quite a lot of money coming in.

MR. ROONEY: Yes, it is. But I tried to do some research on how much it cost the State to process all the bonds. It was rather futile. I could find out that certain departments that are concerned only with bonds, the two departments I am talking about are those that,once the bonds are executed,are responsible for keeping track of them and that the bond refund section, on those two sections, the expenses run each year abut $415,000. This does not count at all the salaries of people who write bonds, and that is hard to find out. Some are written at the police station by policemen. Some are written by clerks in the courts. We just could not find any figures on it. We tried. Now, the difference between 1963 and now is that Illinois is granting a substantial benefit to those same people who would have to go to the bail bondmen. The indigent would still have to sit in jail but the certain group, sort of medium group between being able to put up the 100% and

going to the bail bondman, they would have had to go to the bail bondman and pay 10%. What Illinois has done, say you have a bond set at $100. The person would put down $10 and be released and the State would charge him $1. So what in effect has happened is the State of Illinois has loaned him for the period of the case, no matter how long it took, and, for John Schilb, it took five months, they loaned him $90 and are charging $1 interest for the term of the case. No bail bondman can match that. That is really the reason the bail bondman vanished from the Illinois courts.

QUESTION: Can you make any suggestion whether the State considers that the fellow who puts up 100% has provided the State with money from which the State earns in interest enough so that he makes a contribution not unlike that of the 1% charge except the fellow who puts out only 10%?

MR. ROONEY: Yes, he does. During the term, the 100% is put up that money is also invested just like the 10%. He is making a contribution. I do not know the figures.

QUESTION: He puts up real estate for twice the value?

MR. ROONEY: Correct.

QUESTION: Do you have any information on how many people put up 100% in money?

MR. ROONEY: Yes. In the Circuit Court of Cook County, 90% of the people put up the 10% bond. About 10% put up the 100%.

QUESTION: And the 100% might be money or real estate?

MR. ROONEY: Money or real estate or bond or securities.

QUESTION: It has to be unencumbered real estate?

MR. ROONEY: Yes.

QUESTION: Is there any unemcumbered real estate?

MR. ROONEY: There is, I am sure, though we have quite a few mortgages out. The reason that 90% of the people put up the 10% bond rather than the 100% bond is based, I think, on the return that they can get. There are a lot of rich people who would much rather put up 10% and have their other 90% working for them because the State loans them money at such a fantastically low interest rate. I do not think rich man - poor man makes much difference here because anybody given the choice, if they think it out, will put up the 1% for those poor people. The State is loaning them money at such a fantastically low interest rate that I do not think rich man -poor man applies.

QUESTION: What about the recognizance people?

MR. ROONEY: The recognizance people, as I tried to make clear, the State considers them substantially different

than the people who --

QUESTION: I understand that. But I do not understand -- they are different in the sense they do not have to put up any money?

MR. ROONEY: They are also a different type of individual or the judge would not have let them out on recognizance?

QUESTION: That is true but are you saying you are deciding in advance that certain kinds of people are bad people and other kinds are --

MR. ROONEY: The judge has to make that type of determination.

QUESTION: In terms of expense of administering the program, there is certainly an expense involved in connection with those released on their own recognizance.

QUESTION: They sign a bond, don't they?

MR. ROONEY: Their expenses are the same as putting up a cash bond.

QUESTION: I know the State considers them different but how are they different so that the State may satisfy their entire burden out of just one group?

MR. ROONEY: They are substantially different in that the judge has made a decision that they are most likely to return to the court and, therefore, they need not be burdened with this type of expense as opposed to the

others.

QUESTION: He just made a decision that it is going to require the people involved to contribute to the administrative cost of the cash bond system but not to the -- the collateral bond system but not to the recognizance bond system. The question is whether or not that can be rationally supported.

MR. ROONEY: I think that since we are granting to these people a new substantial benefit --

QUESTION: You are granting the recognizance people even a greater benefit than your 10% people and also from what you say, it probably administratively costs a little more for the recognizance people so you cannot justify it that way, can you?

MR. ROONEY: The way I justify it is over past history. Illinois has never charged people out on recognizance --

QUESTION: Historically and whether or not it is a rational classification --

MR. ROONEY: I do not think we could charge them because they are exercising their constitutional right also.

QUESTION: Much more than their constitutional right. The constitution probably only guarantees them the right not to have to pay excessive bail, doesn't it?

MR. ROONEY: Correct.

QUESTION: What is this -- Appendix B in the appellee's brief seems to bear on the answer to one of the questions that has been asked you. What are D.bonds and what are C.bonds?

MR. ROONEY: That is an official designation. There are three types of bond in Illinois really. I. bonds which are personal recognizance. D. bonds which are the 10% bonds. And C. bonds which are bonds where the man posted the full amount. In Cook County, when we found for the petty offenses where the amount of bail is $25 or less, nobody posts a 10% bond.

QUESTION: Doesn't your law require a minimum of what, $25 or something?

MR. ROONEY: On parking tickets, there is a different type but on most cases, it is $25 for minimum fines. We have also found that once you get over $25 that the amount -- the percentage is 90% that will post the 10% and 10% that will post the 100%. Now, out of that, about 10% that posts the 100% bond, there are Illinois Supreme Court rules which govern certain types of offenses where the Illinois Supreme Court by rule and it is specified in the bond statute that the Supreme Court may specify by rule the Supreme Court specifies $500 cash which means that the 10% is not available to them but that is an anomaly and the

Supreme Court -- it is mostly on traffic offenses and I believe it is to prevent practices of setting too high a bond by speed trap judges. I believe that that is the policy. I do not really understand --

QUESTION: Those rules are not involved in this case, are they?

MR. ROONEY: No. There was an argument made in the Illinois Supreme Court on a petition for re-hearing that perhaps one of the Illinois Supreme Court rules would govern and that 100% should have been boasted rather than 10%, that petition for re-hearing was denied without comment.

QUESTION: I believe that was washed out.

MR. ROONEY: I believe the Illinois Supreme Court passed and said the 10% was properly applied here.

QUESTION: Are we really back to the original one, that of the three systems of bail in Illinois, there is only one that has a 1% charge on it?

MR. ROONEY: Only one.

QUESTION: And all three of them need court officials to do the paper work? All three of them?

MR. ROONEY: Correct.

QUESTION: And the only basis of this one percent on this one is because it is a special new thing?

MR. ROONEY: No, because we are giving them a

special benefit. We are releasing them at 10% of the amount of the reasonable bond.

QUESTION: You could release them for nothing?

MR. ROONEY: Yes.

QUESTION: On their own recognizance?

MR. ROONEY: Yes, we could. That is not utilized --

QUESTION: That is what I think is the argument.

MR. ROONEY: Well, I did not perhaps understand it that way.

QUESTION: I think the difference is that you take the position that once he reaches the point where he is not eligible for his own recognizance, he is in a different category. If he gets the 10%, he has to pay for that because he does not have to put up 100%. That is your position, isn't it?

MR. ROONEY: Correct. And as I tried to explain, I believe that is because the judge has made a determination before we get to that point that he is substantially different.

QUESTION: When one is released on his own recognizance, does he execute -- I notice you said I. bond. Does he execute a personal bond in the amount of $15,000, $10,000, $25,000, whatever the judge fixes?

MR. ROONEY: Yes.

QUESTION: So, the only difference is that he executes a personal bond without sureties, really, isn't it?

MR. ROONEY: Correct. Absolutely right.

QUESTION: He does not sign a bond agreeing to show up or --

MR. ROONEY: Yes, he just signs a bond promising he will show up.

QUESTION: If he does not, he can forfeit $15,000 --

MR. ROONEY: He forfeits the face amount of the bond.

QUESTION: How much is the bond on personal recognizance?

MR. ROONEY: It depends on the type of offense. The judge sets what the amount of bond would be except for the fact that he feels this accused person is the type of person who is most likely to show up for trial and, therefore, the State will not have to go to additional expense of going out and looking for him and bringing him to trial. One of the problems with the bail bond system was that the bail bondman was not the man that returns the defendant if the bail was jumped. That type of value is very speculative. Most of them were picked up by the police officials and brought back to the court that way. So, the bail bondman did not go through any expense that way.

QUESTION: Your personal recognizance is the typical kind of --

MR. ROONEY: I think it is universal.

QUESTION: Of a bond signed by the individual with no sureties?

MR. ROONEY: I think it is universal throughout the court system in the U. S.

QUESTION: Let me ask the same question I asked your opponent. If you lose this case, do you anticipate a return to the old bondman system?

MR. ROONEY: I do not know how else the State of Illinois can function still having a 100% system. If you take the 10% fee off, you will have a 10% system with no fee and it will be mandatory as of right now. So what that will mean is that after a judge finds that a reasonable amount of bonds will be 100%, he will be allowed out on a 10%. We think that would be an abrogation of the judges discretion in setting bonds.

QUESTION: So, really what you are saying is the judge sets bail on every case. He sets bail on every case. For some people you have to put up 100%. Other people put up 10. Others do not have to put up anything.

MR. ROONEY: Correct.

QUESTION: It is at an option of the defendant to put up 10% or 100%?

MR. ROONEY: It is up to the defendant but on the recognizance --

QUESTION: But the law permits these three ways of satisfying the bail?

MR. ROONEY: Correct.

QUESTION: You never release anyone there just on the promise to show up.

MR. ROONEY: That is the recognizance bond or what we in Illinois call the I. bond.

QUESTION: But it will cost some money?

MR. ROONEY: Oh, correct. I think the State has --

QUESTION: Don't you have any forms of bonds -- in my State, we have on personal recognizance the judge could say a personal bond of $15,000;if you did not show up the State would have to reduce that bond to judgment against your property. Or the judge could say, I did it many times, I will just accept your promise that you will show up. Don't you have that?

MR. ROONEY: It is not utilized that way, judge. Excuse me. Justice. In closing, I would like to turn to the third point the plaintiffs raise in their brief and that is that no bonds costs can be imposed on any person who is found innocent. They rely on the Giacco case. The Giacco case involved court costs where the jury really

was given the option of punishing a person after they found him innocent. The Illinois Supreme Court termed this an administrative cost but I do not think the inquiry has to stop there. I think as was suggested earlier, there are some parts of our Society that do not function perfectly and part of it is our criminal justice system. Of Course, there are going to be mistakes where an innocent person, we do find innocent people. And those people unfortunately will have to bear this type of cost. Now, there might be a type of remedy if the State has absolutely no justification for picking them up. This might be an element of damages in a civil rights action or in a false imprisonment action. But it is not the type of situation that should be brought up here really on a class action and I would like to point out that there was no allegation in this suit that anybody was indigent. There was no motion for reduction of bond. There was no motion for release on recognizance. The cases here, the plantiff in this case is really suing on behalf of indigent people. We do not know anything about them. There is a stipulation of facts but the -- it is very sketchy. It is from down State Illinois and our office did not participate in it. One of the real problems is that John Schilb might have been one of these people who made an intelligent decision. He had the money but he added up the interest rates and came

out and said I will put down the 10%. And I think that if the bond was excessive in his case, it should have been tested the general way by writ of habious corpus or motion for reduction of bond.

QUESTION: What are the State interests that you assert justify this discrimination among the three classes?

MR. ROONEY: I think the fact that the State of Illinois is granting to these people a substantial benefit which they did not have before and also pursuing a valid purpose in eliminating the bondman from the court system justifies the imposition of this type of cost on this class. They were the ones who had to go to the bondman before and they were the ones who had to pay 10% before. We are letting them out on a cost of 1% and we think that is sufficient to designate that class as the one to bear the cost.

QUESTION: This case came out of St. Clare County. Is that right?

MR. ROONEY: Yes.

QUESTION: How do you get in as a Cook County States Attorney?

MR. ROONEY: It is an interesting situation. We have the same type of class action pending in Cook County and we felt that we had quite an interest in this case because we handle much of the criminal litigation in Cook

County and there is a possibility of a lawsuit right now of $2,500,000 to Cook County through refund of this type of payment.

QUESTION: St. Clare County is vitally interested?

MR. ROONEY: I believe they were going to be here but they -- they are vitally interested. They asked our office to handle the appeal for them.

MR. O'TOOLE: May it please the court, I just wish to make a few observations. Initially here the issue is the constitutionality of that cost retention provision. This system will go on regardless of what this discriminatory imposition of a burden on one segment is done away with. If I could answer, I believe it was Mr. Justice Marshall, where did the one percent figure come from? It came from the fact that they got 1% on for features from bondsmen. Today they equate very close to that 1% on forfeitures on bail jumping where people deposit 10% or they deposit the full amount. They are getting the same amount of money they got before. The only thing they are doing today is charging one segment a cost where they never charged a cost to anybody before. That is basically what it is.

QUESTION: I am confused. They would have paid 10% to the bondman?

MR. O'TOOLE: Right.

QUESTION: These people right here. And they would not get any of that back?

MR. O'TOOLE: That is right.

QUESTION: So Illinois says if you pay us the 10%, we will let you out on the same conditions and when the case is over, we will give you 9% back.

MR. O'TOOLE: The big difference --

QUESTION: How do you lose on that?

MR. O'TOOLE: Basically --

QUESTION: How does this man lose??

MR. O'TOOLE: That man does not lose at all. I agree with you they have improved the system. There is no doubt about it. But the difference between the clerk and bondsman is the clerk is not undertaking to pay the full amount if the guy jumps bail.

QUESTION: But, the clerk would not have undertaken to pay himself?

MR. O'TOOLE: It would all go in the country Treasury, but the County --

QUESTION: The bondmen are not party in interests to this case?

MR. O'TOOLE: No, they are not. We do not want them --

QUESTION: That is what I am worried about. I am worried about these people who instead of paying 10% are paying 9%.

MR. O'TOOLE: That is right.

QUESTION: I mean 1%.

MR. O'TOOLE: That is right.

QUESTION: And they are complaining.

MR. O'TOOLE: They do not think they should pay anything because nobody is paying for it.

QUESTION: I would agree that zero is better but --

MR. O'TOOLE: Yes, your Honor, but in relation to Mr. Justice Brennan's question, there are several jurisdictions. There are three jurisdictions at present which have a 10% deposit statute such as Illinois. Two charge no one any cost.

QUESTION: What two are they?

MR. O'TOOLE: Iowa and I think it is Alaska. It is Alaska, your Honor. Wisconsin last July, July of 1969, put in a 10% deposit statute. They charge the guilty who deposit 10%, one percent and charge the innocent nothing. In the State of New York, they have across the board two percent, I believe.

QUESTION: No matter how you are released?

MR. O'TOOLE: No matter how you are released, but they do not have a 10% system such as ours. It isn't a true 10% deposit system.

QUESTION: Does the District of Columbia have 10%?

MR. O'TOOLE: That is under the Federal Act, your Honor. Now, right after the State of Illinois enacted our 10%, the Federal Government, 88th Congress, there were three bills introduced in the Senate. One of the bills was the identical provision that we have here in Illinois. That is 10% in a 10% charge. Those bills

died in Committee in the 88th Congress and were re-submitted into the 89th Congress and between the 2 sessions of Congress, the Congress pulled out the 10% charge so now there is no charge in a Federal system which permits a judge to release a person on less than full bond in his discretion. Our system is contra to the Federal system. Those are the only jurisdictions I know that have any provision for release on less than full. In relation to the statistics, I would just wish to make one observation as to all people who make deposits. If you would turn to their statistics, you would note one thing. I have it broken down. Initially, all people who have a bond of $25 or less, this is a minor offense, must post the full amount. There isn't any 10% deposit on $25 or less. So that throws the statistics out a little bit. The second thing is that, taking a look at this breakdown, in District No. 1, which is the city of Chicago, where one out of 47 puts up the full amount of bond. If you take a look at District 3, which is a relatively affluent suburban area, two out of every five deposit the full amount. And what benefit do they get and why do they do it? One, they have the means to do it. Just as the individual who gets out on his own recognizance, and incidentally, Mr. Justice Brennan, there is no amount mentioned in ours -- rare occasions but then, only about 2% of the people -- bail application in

the State of Illinois is not at its best. While not in the record, just as a matter of information, there is a schedule in Cook County for bail. $10,000 for this. Narcotics arrest. Take the advice of the narcotics officer. These are the directions that go to the judges. About 2% are released on their own recognizance. Now, what benefit or why would somebody who is affluent post the full amount? Because he has the ability to post Treasury bills, stock, bonds, any type of a security representing an interest. He can pledge for his freedom and leave that asset intact, and earn interest while we are imposing a cost. Here we are allowing this person to continue making money on his investment. And he receives a benefit. The person who is released on OR receives a benefit. The 10% person receives a benefit. But why should a system insist that one segment of those who are released on bond support that entire system? And when there isn't even a need for it because the same bond forfeitures that existed prior to the Act exist today. This is actually a fiscal policy of increasing the revenues. That is all it is.

CHIEF JUSTICE BURGER: Thank you, Mr. O'Toole. The case is submitted.